

**In:** KSC-SC-2024-02  
**The Prosecutor v. Salih Mustafa**

**Before:** Supreme Court Panel  
Judge Ekaterina Trendafilova  
Judge Christine van den Wyngaert  
Judge Daniel Fransen

**Registrar:** Dr Fidelma Donlon

**Filed by:** Dr Anni Pues, Victims' Counsel

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**VC Response to the Request on the Protection of Legality**

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Dr Anni Pues

## I. INTRODUCTION

1. In this submission, Victims' Counsel responds to the Defence Request on the Protection of Legality. The submission is limited to issues that directly affect victims' rights and interests, which are spelled out below for the specific grounds raised by the Defence and as far as addressed in this submission.

## II. PROCEDURAL HISTORY

2. On 16 December 2022, Trial Panel I convicted Salih Mustafa for the war crimes of murder, torture and arbitrary detention and sentenced him to 26 years imprisonment.<sup>1</sup> On 14 December 2023, the Appeals Panel issued its Appeal Judgment and confirmed all convictions but reduced the sentence to 22 years.<sup>2</sup> These two decisions form the basis for the Defence Request for Protection of Legality pursuant to Article 48 (6) to (8) of the Law and Rule 193 of the Rules, which was filed on 14 March 2024.<sup>3</sup> Hereafter, the appointed Panel of the Supreme Court Chamber ordered the Specialist Prosecutor's Office and Victims' Counsel to file their responses to the Request, if any, by 15 April 2024.<sup>4</sup>

## III. SUBMISSIONS

3. Article 48 (7) of the Law provides for the extraordinary remedy of the protection of legality. It requires the allegation of (a) a violation of the criminal law within the Law on the KSC or (b) that the proceedings contained a substantial violation of the procedures set out in the Law and in the Rules of

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<sup>1</sup> KSC-BC-2020-05, F00494, Trial Panel I, Trial Judgment, 16 December 2022.

<sup>2</sup> KSC-CA-2023-02, F00038/RED, Court of Appeals Panel, Public Redacted Version of Appeal Judgment, 14 December 2023 (hereafter: "Appeals Judgment").

<sup>3</sup> KSC-SC-2024-02/F00011, Defence Request for Protection of Legality with Confidential Annex 1 and 2 pursuant to Article 48 (6) to (8) of the Law and Rule 193 of the Rules, 14 March 2024 (hereafter: "Defence Request").

<sup>4</sup> KSC-SC-2024-02/F00012, Order on the Time-Limits for Submissions, 15 March 2024.

Procedure and Evidence. In its request, the Defence identifies five grounds claiming both criminal law violations as well as violations of procedural rules.

*Grounds I-III*

4. Grounds I-III all address questions of sentencing and specifically of article 44 of the Law and the law applicable to determine the sentence in this case. Victims' Counsel has to date not made any submissions linked to questions of law as far as sentencing was concerned, as victims' interests were not squarely affected. They based their trust in the respective Panel of judges to do justice and find the appropriate punishment for the crimes Mustafa committed.
5. Victims' Counsel wishes to point out that most victims' participating in this case felt that the Trial Panel's decision on sentencing was appropriate in relation to the gravity and harm they suffered. Some even wished that the sentence should have been even higher. Victims therefore felt some disappointment with the Appeals Judgment in as far as it reduced the sentence to 22 years, having said that, they also expressed their respect for the judiciary in this context. At this juncture, it is in the victims' interest to ensure that the sentence is reflective of the gravity of the crimes and harm they suffered. For that reason, Victims' Counsel feels compelled to briefly comment to the Defence submissions in grounds I-III, which all seem to suggest a violation of the substantive criminal law, namely article 44 of the Law.
6. This Chamber of the Supreme Court clarified previously in the case against Gucati and Haradinaj that a violation of the criminal law may only be found under limited circumstances, which are specified in Article 385(1) of the Kosovo Criminal Procedure Code as an exhaustive list of such violations.<sup>5</sup>

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<sup>5</sup> KSC-SC-2023-01/F00021, Decisions on Requests for Protection of Legality, 18 September 2023, para 17.

Such a violation exists where: (i) the offence for which the accused is prosecuted is not a criminal offence; (ii) circumstances exist which preclude criminal liability and, in particular, if criminal prosecution is prohibited by the period of statutory limitation or precluded due to an amnesty or pardon, or prior adjudication by a final judgment; (iii) circumstances exist which preclude criminal prosecution; (iv) an inapplicable law was applied to the criminal offence; (v) in rendering a decision on punishment, alternative punishment or judicial admonition or in ordering a measure of mandatory rehabilitation treatment or the confiscation, the court exceeded its authority under a law; or (vi) provisions were violated in respect of crediting the period of detention, house arrest, any period of deprivation of liberty and an earlier served sentence related to the criminal offence subject to the criminal proceedings.<sup>6</sup>

7. The Defence fails to set out which of these violations it claims. The Defence submissions are ambiguous in whether they claim that an inapplicable law was applied, which would require challenging the validity of article 44 (1) of the Law or whether the court exceeded its authority. Already for this reason, Victims' Counsel is of the view that the submissions on grounds I-III are inadmissible.
8. However, should the Panel decide to accept the submissions as admissible and consider them on the merits, Victims Counsel wishes to highlight a couple of critical misrepresentations in the Defence submissions.
9. The first issue is linked to the discussion of the *lex mitior* principle in which the Defence quotes the Appeals Panel in a misleading way. The quote provided in para 29 of the Defence Request is an indirect reference to ICTY

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<sup>6</sup> KSC-SC-2023-01/F00021, Decisions on Requests for Protection of Legality, 18 September 2023, para 17.

case law (Nikolić Sentencing Appeal Judgement) and preceded in the Appeals Judgment by the following:

“The principle of *lex mitior* is understood to mean that, if the law relevant to the offence of the accused has been amended, the less severe law should be applied. It is an inherent element of this principle that the relevant law must be binding upon the court. Accused persons can only benefit from the more lenient sentence if the law is binding, since they only have a protected legal position when the sentencing range must be applied to them.”<sup>7</sup>

The Defence placed an emphasis on the international nature of the tribunal and claimed that this was wrong, as the KSC was not international in nature. Viewing the entire reference in the Appeals Judgment in context makes clear that what matters for the discussion is not the nature of the tribunal (whether it is international or domestic) but on the binding nature of the law for the court in question.

10. This stance and interpretation of the law was not called into question in subsequent case law. Indeed, the Grand Chamber of the European Court of Human Rights refers to this case law in the case *Scoppola v Italy* in its discussion of the scope of article 7 of the ECHR.<sup>8</sup>
11. The second critical misrepresentation is that of the available sentencing range in the 1976 Criminal Code of the Socialist Federal Republic of Yugoslavia for war crimes. The Defence argues that the ‘applicable code is the 1976 CCSFRY prescribing a sentencing range of five to fifteen years.’<sup>9</sup> This is incorrect, the available sentencing range would be from five to twenty years or the death penalty, the latter having been abolished with the Dayton Peace Agreement. Two provisions are relevant here: (1) article 142 providing a sentencing range

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<sup>7</sup> Appeals Judgment, para 465.

<sup>8</sup> [Scoppola v Italy, 10249/03](#), Grand Chamber Judgment, 17 September 2009, para 105.

<sup>9</sup> Defence request, para 44.

of not less than five years or the death penalty for war crimes such as murder, torture as well as illegal arrests and detention<sup>10</sup> and (2) article 38 as a general provision, specifying that imprisonment may be imposed for up to twenty years for acts eligible for the death penalty.<sup>11</sup>

12. It is submitted here that in Victims' Counsel's view, the Appeals Panel neither based its Judgment on an inapplicable law nor did it exceed its authority.

#### *Ground IV*

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<sup>10</sup> Article 142: "Whoever in violation of rules of international law effective at the time of war, armed conflict or occupation, orders that civilian population be subject to killings, torture, inhuman treatment, biological experiments, immense suffering or violation of bodily integrity or health; dislocation or displacement or forcible conversion to another nationality or religion; forcible prostitution or rape; application of measures of intimidation and terror, taking hostages, imposing collective punishment, unlawful bringing in concentration camps and other illegal arrests and detention, deprivation of rights to fair and impartial trial; forcible service in the armed forces of enemy's army or in its intelligence service or administration; forcible labour, starvation of the population, property confiscation, pillaging, illegal and self-willed destruction and stealing on large scale of a property that is not justified by military needs, taking an illegal and disproportionate contribution or requisition, devaluation of domestic currency or the unlawful issuance of currency, or who commits one of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty." Available at <https://www.refworld.org/legal/legislation/natlegbod/1977/en/13685>.

<sup>11</sup> The general part of the 1976 Criminal Code of the Socialist Federal Republic of Yugoslavia reads as follows:

'Imprisonment, Article 38:

- (1) The punishment of imprisonment may not be shorter than 15 days nor longer than 15 years.
- (2) The court may impose a punishment of imprisonment for a term of 20 years for criminal acts eligible for the death penalty.
- (3) For criminal acts committed with intent for which the punishment of fifteen years imprisonment may be imposed under statute, and which were perpetrated under particularly aggravating circumstances or caused especially grave consequences, a punishment of imprisonment for a term of 20 years may be imposed when so provided by statute...'

This provision is preceded by article 37 on capital punishment:

- (1) ...
  - (2) The death penalty may be imposed only for the most serious criminal acts when so provided by the statute.
  - (3) ....
  - (4) The death penalty may be imposed ..., for criminal acts against humanity and international law...'
- Available at <https://www.refworld.org/legal/legislation/natlegbod/1977/en/13685>.

13. Ground IV reiterates the discussion on the conviction for murder and claims violations of procedural rules that – in the view of the Defence – should in consequence lead to the annulment of the judgment.<sup>12</sup> This would directly affect the interests of the indirect victims participating in this case. Seeing justice done and achieving appropriate acknowledgment of the murder was critical for them. Because of these affected interests, Victims’ Counsel will in the following make submissions on the matter.
14. The submission lacks clarity as to the alleged violation, whether this is of a procedural or a substantive nature, given the detailed reiterations on questions around causation. Be that as it may, in the Victims’ Counsel’s view, the submissions on Ground IV are also inadmissible.
15. For procedural violations, the Supreme Court has previously held that the high threshold of a “substantial violation” of the procedures occurs when this “materially affects the judicial finding”.<sup>13</sup> Whether an alleged violation constitutes “[...] “a substantial violation of the procedures set out in [the] Law and [...] the Rules [...]” should be assessed on a case-by case basis in view of the circumstances underlying each particular request.<sup>14</sup> The Supreme Court Panel also recalled ‘that it may find a “substantial violation of the procedures” if the Court of Appeals Panel, for example: (i) omitted to apply a provision of the Law or the Rules; (ii) incorrectly applied the Law and/or the Rules; or (iii) violated the rights of the Defence in a manner which has influenced the rendering of a lawful and fair decision.’<sup>15</sup>
16. Here, the Defence points to Rule 159(3) of the Rules, which requires the Trial Judgment to be in writing and to contain a reasoned opinion for the findings

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<sup>12</sup> Defence Request, para 110.

<sup>13</sup> KSC-BC-2020-06, PL001/F00008, Decision on Kadri Veseli’s Request for Protection of Legality, 15 August 2022, para 23.

<sup>14</sup> KSC-SC-2023-01/F00021, Decisions on Requests for Protection of Legality, para 14 with further references.

<sup>15</sup> KSC-SC-2023-01/F00021, Decisions on Requests for Protection of Legality, para 14.

of the Panel. The Defence has not demonstrated how the written and reasoned judgment would violate this rule and what the substantial procedural breach is.

17. Regarding any claims as to the lack of a written appeals judgment (Rule 183(3) of the Rules), this is also wholly unsubstantiated. The Appeals Panel engages extensively with the principle of *novus actus interveniens* in its written judgment.<sup>16</sup> The Defence fails to demonstrate how this extensive written discussion would amount to a substantial violation of this procedural rule.
18. It seems that the Defence submissions are effectively an attempt to trigger a reconsideration of evidence heard throughout the trial stage.<sup>17</sup> The extraordinary remedy of protection of legality, however, does not provide a back door to repeat discussions of evidence from previous stages of the proceedings – it is not meant to create another general avenue of appeal.<sup>18</sup> Mere disagreement with factual findings of the first or second instance courts, as is the case here, do not meet the admissibility threshold, such ground may be dismissed without discussion of the merits.

#### **IV. RELIEF REQUESTED**

19. Victims Counsel requests that

the request of protection of legality is dismissed.

#### **V. CLASSIFICATION**

20. This filing responds to a public filing and is therefore classified as such.

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<sup>16</sup> See Appeals Judgment paras 341-355 for the Panel's assessment.

<sup>17</sup> Defence Request, paras 96-100.

<sup>18</sup> KSC-SC-2023-01/F00021, Decisions on Requests for Protection of Legality, 18 September 2023, para 9 with further reference to Kosovo Supreme Court case law.



**Word count: 2217**

A handwritten signature in black ink, appearing to read 'Anni Pues', with a stylized flourish at the end.

**Anni Pues**  
**Victims' Counsel**

12 April 2024

At The Hague, the Netherlands